

February 13. 1766.

A N S W E R S

F O R

JOHN CAMPBELL of Otter;

T O

The PETITION of *William Wilson*,
Writer to the Signet, Trustee for *Alexander
Campbell*, Messenger in *Edinburgh*.

COLIN CAMPBELL, the Respondent's Grandfather, in 1678, acquired the Estate of *Otter* by Purchase from the Earl of *Argyle*, at a very high Price, as Lands then sold; and after he, and two of his Sons successively, and the Respondent his Grandson, had possessed the Estate for eighty-one Years and some Months, as absolute Owners, under feudal Titles, the most complete and sufficient known in the Law of *Scotland*, the present Action was instituted by the Pursuer against the Respondent, for evicting the Estate from him, under a Pretence of the Earl of *Argyle*, the Vendor's Right being exceptionable, and that the Respondent's Right was not secure by positive Prescription, because of the various Deductions that ought to be made from the Years the Estate had been possessed by the Respondent and his Predecessors, on account of Minorities, and other Occurrences in the Pursuer's Family.

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The Attempt appeared to the Respondent and the Counsel he advised with, to be the Effect, either of Folly or Madness, and not to be an Object worthy the attending to. But the Action has since been carried on by the Pursuer, assisted by an able Agent and Trustee, and the very ablest Counsel, with so much Assiduity, Skill, and Address, as lat-

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terly to call upon the Respondent's greatest Attention; and by the Justice of the Court he has been assailed from the Action.

It was hardy to attempt the evicting an Estate, which for upwards of fourscore Years had been enjoyed by an onerous Purchaser and his Heirs, under complete feudal Titles: But it appears to the Respondent to be still more hardy in the Petitioner, after hearing the Principles of our Law applicable to this Case, so fully, and with so much Unanimity explained by your Lordships, not only to reclaim against the Interlocutor that has been pronounced; but by Insinuations and Misrepresentations, in his Petition, to injure the Character and Memory of a noble Lord, so long dead, and who merited so well of his Country, and even to misconstrue the Law itself in many Respects.

The Petition has been drawn with much Art and Anxiety; and yet the Respondent can read in it, that the Petitioner does not flatter himself to procure by it a Judgment from your Lordships in his favour; but that it is truly intended for another Meridian, where he may possibly think the Principles of the Law of *Scotland* are not so well understood.

The Respondent does not propose in these Answers to follow the Petitioner in every Branch of his Argument, but he will endeavour to state the Merits of his Defence with as much Perspicuity and Brevity as possible, and shall take Notice of the most material Arguments in the Petition.

The Petitioner has taken several Things for granted; and more particularly, that your Lordships were of Opinion, that the several Minorities claimed to be deduced by him in computing the Years of Prescription, were all sufficiently proved; and therefore has set them aside by the Lump as so many Articles adjudged for him.

Although the Respondent does not imagine, that it is necessary for him to impugn the Proof that has been offered of the Minorities; yet he cannot agree to its being understood, that the Proofs of the Minorities either were held by the Court, or ought to be held to be sufficient: And although he does not mean to state at great Length the several Matters taken for granted in the Petition, yet he proposes
shortly.

shortly to bring them under the View of the Court, prior to his taking under Consideration the several Points endeavoured to be maintained in the Petition.

But previous to this, it will be proper to give the History of the Estate of *Otter*, prior to the Respondent's Grand-father's purchasing it, so far as it can be discovered from the different Writings that have been recovered and produced in this Process. Fact.

Colin Campbell, an ancient Owner of the Estate of *Otter*, died about 1620, leaving Issue several Sons; and was succeeded in the Estate by *Archibald*, his eldest Son.

Archibald intermarried with *Anne Stirling*; and in their Marriage-contract he provided the Estate of *Otter*, and the Lands of *Eveneckan* and *Darmacherichbeg*, which he had acquired himself, to the Heirs-male of the Marriage; whom failing, to his other Heirs-male.

The Marriage dissolved by the Death of *Archibald*, leaving Issue a Daughter only, who, by the Marriage-contract, had 5000 Merks of Portion; and the Succession of the Estate as a male Fee, devolved upon *Colin*, the Brother of *Archibald*.

Colin appears to have owed considerable Debts, for which Apprisings were deduced against his Estate; and amongst others, it appears, that *Jean Campbell*, after taking a Decreet against him for her Portion of 5000 Merks, and *William Stirling*, as Assignee or Trustee for *Anne Stirling*, had taken a Decreet on account of Alimment due to her for her Daughter *Jean Campbell*, they both concurred in apprising the Estate; upon which they expedite a Charter from the Crown, the Earl of *Argyle* as Superior being then forfeited; and in the Charter, which was completed by Infeftment, ^{Sep.} the whole Estate belonging to *Colin* is comprehended, excepting the ^{-1663.} Lands of *Darinacherichbeg*; and in the Charter the Lands are granted and confirmed *dilectis nostris Jeannæ Campbell, soli filie legitimæ quondam Archibaldi Campbell de Otter, et Willielmo Stirling, filio legitimo Archibaldi Stirling de Coldoch, heredibus eorum, et assignatis quibuscunque, hereditarie, alteruteri eorum pro eorum partibus, omnes et singulas terras aliaque jusscript.*

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The Charter and Infeftment have been recovered, and produced in Procefs.

March 2.
1667. *William Stirling*, the Co-appriſer, conveyed his Appriſings, Sums appriſed for, and Lands appriſed, to *Jean Campbell*, and *Alexander Campbell* her Huſband, the longeſt Liver of them two in conjunct Fee and Liferent, and the Heirs to be procreate betwixt them in Fee; and they were infeſt in the Lands, by virtue of a Precept of Seifin contained in the Diſpoſition.

Jan. 8.
1684. *Jean Campbell* and her Huſband, diſponed to the Earl of *Argyle* the whole Lands appriſed by them and *William Stirling*, and conveyed to the Earl the Decreets of Appriſing, and the relative Writings, and aſſigned him “in and to the haill Rents, Mails, Farms, “Kains, Customs, &c. of the haill Lands and others reſpectively, “and particularly above diſponed, of this inſtant Crop and Year “of God 1672, and yearly and ilk Year in time coming.”

The Diſpoſition contained a Procuratory of Reſignation, in virtue of which the Lands were reſigned in the Hands of the Earl as Superior, *ad perpetuam remanentiam*, and the Inſtrument duly recorded; but the Lands of *Evenechan* was not comprehended in the Reſignation, as they were held of a different Superior.

It is difficult to diſcover the Nature or Intentions of Tranſactions ſo ancient; but there is Reaſon to believe, that the Earl of *Argyle*, about the Time of his purchaſing *Jean Campbell* and her Huſband's Right to the Eſtate of *Otter*, did likewise acquire all the other Appriſings deduced againſt the Eſtate, and Debts due by the Family of *Otter*; and that he did make ſome Tranſaction or Agreement, by which it was ſettled, that he was to have the Eſtate of *Otter* in Conſideration of what he had paid, and that the Family was to enjoy the Lands of *Evenechan* and *Darinacherichbeg*.

There is no real Evidence of any ſuch Agreement or Contract being executed; but there is much Reaſon to preſume it. It is admitted in the Petition, that the Earl acquired Debts to the Amount of 23,471 Merks. There is Reaſon to believe he acquired Right to more. The Family could have no Proſpect of paying off Debts ſo conſiderable with the annual Profits of their ſmall Eſtate. It was therefore

therefore natural for them to agree to give the Earl Land in Satisfaction of the Debts he was Creditor in: And as the Family of *Otter* from that Time assumed the Title or Designation of *Evenechan*, and entered to the Possession of these Lands, and of *Darinacherichbeg*, and which they continued to possess ever after, as will be explained in the Sequel, without making any Challenge to the Duke of *Argyle's* Right to the Lands, which by that Time had become irredeemable; it affords the strongest Reason to believe, that all those Things must have been done by the mutual Consent of the Parties.

The Estate of *Otter* at this Time only yielded a Rent of *L. 1000* Rent of the Estate of Otter. *Scots*, or *L. 100 per Year*; and the Earl of *Argyle* holding himself to be Proprietor of it, did, for the Price of 40,700 Merks, which was an exceeding high Price for such an Estate in those Days, sell and dispoise the Estate to the Respondent's Grandfather in Liferent, March 21. 1678. Purchas- and to *Alexander Campbell* his eldest Son in Fee; and in the Disposition he conveyed certain Feu-duties to the Purchaser in real War-ed by the Respondent's Grandfather. randice against Eviction for the Space of forty Years; which was a Practice most common in those Times, whenever Lands were sold for a full and adequate Price.

The Purchaser is assigned by the Disposition to the Rents, for Crop and Year 1677, and in time coming, with the following Exception; "Excepting forth and frae the said Assignment, the Mails, Farms, and Duties of the Lands of *Largiebeg* and *Largiemore*; "the Lands of *Kilfail*, and the just and equal half of the Lands of *Corra*, which is liferented by the said *Anne Stirling*; and which Anne Stirling's Liferent. "Liferent-right is hereby reserved to her during all the Days of her Except- "Lifetime; the Rents and Duties of which Lands extends yearly to ed in the Assignment to the Mails and Duties. "the Sum of 600 Merks *Scots* Money."

Anne Stirling here spoke of was the Widow of *Archibald Campbell* before mentioned, once Owner of the Estate of *Otter*: But her Liferent was not constituted by Infestment, as is erroneously said in the Petition; for her Marriage-contract had neither Precept nor Procuratory for infesting her; and there is no sort of Reason to believe that ever she was infest.

Anne Stirling at this Time was married to *John Macneil* of *Tay-*
nish; and although she had no Infestment for her Liferent of 600
B Merks,

Merks, yet she had Right to it, and it became proper that she should be secured in Payment; and that the Respondent's Grandfather, *Colin Campbell*, the Purchaser of the Estate, should at the same time be relieved of it.

Method taken to relieve the Respondent's Grandfather of *Anne Stirling's* Life-rent.

The Method followed in doing this, was the Earl's conveying to *Colin Campbell* the Purchaser an equivalent Sum out of the Feu-duties payable for *Taynish's* Estate to the Earl, and which was accordingly done; by which Means the Matter came easily to be adjusted by *Anne Stirling's* discharging her Liferent, and she and her Husband accepting of a Discharge of an equivalent Sum of Feu-duties payable out of his Estate.

The Clause in the Disposition, by which the 600 Merks of the Feu-duties was conveyed to the Respondent's Grandfather, stands in the following Words: "And because, in all Equity and Justice, the said *Colin*, and his said Sons, and their forefairs, ought to have the equivalent Rent of the said Lands liferented by the said *Anne Stirling* during all the Days of her Lifetime; therefore we the said *Archibald* Earl of *Argyle*, with Consent foresaid, makes, constitutes, and ordains the said *Colin Campbell*, his said Sons, and their forefairs, our very lawful Cessioners and Assignees, in and to the like Sum of 600 Merks, Money foresaid, due and payable to us as Feu-duty forth of the foresaid Lands of *Taynish*, and others therein mentioned, being a Part of the Warrandice above disposed; and that of this instant Crop and Year of God 1678 Years, the samen Rent being paid otherwise to the said *Colin Campbell*, for the said Crop and Year of God 1677 last bypast, and sicklike yearly, and ilk Year, in time coming, during the Lifetime of the said *Anne Stirling* allenary, and no longer, except in case of Eviction, as said is."

It is said in the Petition, that the Feu-duties of *Taynish's* Estate did only amount to 185 Merks; which therefore could not answer to the Payment of *Anne Stirling's* 600 Merks. But this is a gross Mistake in the Petitioner; and if he had looked to the Disposition, he would have found the Island of *Giga* mentioned in the before-recited Clause, stated as paying a Feu-duty of 400 Merks, and the Mill of *Kilmorie* a Feu-duty of 65 Merks, making, with the 185 Merks of Feu-duty for the Lands of *Taynish*, properly so called, in all

all 650 Merks; and which is the Feu-duty paid by the Family of *Taynish* at this Day to the Duke of *Argyle*, as can be proved by his Chartelary and Rentals of his Estate, if necessary.

Colin Campbell the Purchaser, in Implement of the Disposition, obtained a Charter from the Earl of *Argyle* as Superior, to himself in Liferent, and his eldest Son in Fee; and which Charter was confirmed by another Charter under the Great Seal. And those Charters were regularly completed by Infestment, and the Seifins duly recorded.

Charter upon the Disposition to the Respondent's Grandfather.

Seifin, April 3. 4. 5. 6. 9. 11. & 29. 1678.

The Validity of the Titles in the Respondent's Family not challenged.

The Validity of these original Writs from the Earl of *Argyle*, or the subsequent Titles in the Persons of the Respondent and his Father, have not, nor could not possibly be disputed: Nor has it been controverted, that if forty Years Possession has followed upon those Titles, independent of the Deductions to which the Petitioner may be intitled to on account of the different Pleas set up by him, it establishes a Right that cannot now be challenged on account of any Defect of Title in the Earl of *Argyle*.

The Estate of *Otter* purchased by the Respondent's Grandfather, was denominated a Forty-merk Land, and consisted of the following Parcels.

The Four-pound Land of *Balliemore*.

The Four-merk Land of *Ballilongart*.

The Four-merk Land of *Towlon*.

The Four-merk Land of *Fernoch*.

The Four-merk Land of *Stroan*.

The Four-merk Land of *Ardgadden*.

The Four-pound Land of *Corra*.

The Four-merk Land of *Killail*, with the Mill and Mill-lands thereof.

The Four-merk Land of *Largie*.

Particular Lands of which the Estate of *Otter* is composed.

The Lands of *Evenechan*, though contained in the Apprisings acquired by the Earl of *Argyle*, were not comprehended in the Sale, and which the Petitioner imputes to the Apprisings not being regularly deduced against them; but the Fact as stated by him is not supported by Evidence; and the Circumstances which appear

Lands of *Evenechan* not sold to the Respondent's Grandfather.

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in this Case give Reason to believe, that by Transaction or Agreement, they were allowed to return to the Family; but however that may be, it is a Matter of no Consequence in this Cause.

Anne Stirling's Liferent Lands.

The Liferent intended for *Anne Stirling* by her Marriage-contract, was of the Lands of *Largibeg*, *Largimore*, *Killsail*, and half of *Corra*, the Rents of which were understood to be 600 Merks.

Mary Campbell's Liferent of Ardgadden.

Besides this, there was a Liferent constituted in favours of one *Mary Campbell*, of the Lands of *Ardgadden*, also Part of the Respondent's Estate, and which came to be constituted in the Manner following.

How constituted.

1660.

Duncan Campbell, Baillie-depute of *Kintyre*, Husband to the said *Mary Campbell*, did, for himself and his Wife, advance to *Colin Campbell*, the Brother of *Archibald*, and who upon his Death without Male-issue, succeeded to the Estate, 2500 Merks; for which Sum, and 1000 Merks which had been owing by *Archibald Campbell* to the said *Duncan Campbell*, *Colin Campbell* did dispoise the Lands of *Ardgadden*, under Reversion, to *Duncan* and *Mary*, the Husband and Wife, and the longest Liver of them two in conjunct Fee.

Feb. 19.
1669.

This Contract of Wadset, or Disposition under Reversion, was completed by Infestment, and confirmed by the Earl of *Argyle* as Superior.

1678.

Duncan Campbell died indebted to *Patrick Campbell*, Son to Mr *John Campbell* in *Fernoch*; who having charged *Dougal Campbell*, the Son of *Duncan*, to enter Heir to his Father, *Dougal* renounced; and *Patrick* got an Adjudication against the Lands of *Ardgadden*, as in the *hereditas jacens* of *Duncan Campbell*; and after obtaining a Charter from the Earl of *Argyle* as Superior, and being infest thereon, he immediately, for a valuable Consideration, resigned the Lands *ad remanentiam* in the Hands of the Earl.

Wadset of Ardgadden resigned to the Earl *ad remanentiam*.

It appears, that *Patrick Campbell* the Adjudger, had acted in that Matter as a Trustee for *Dougal*, the Son of *Duncan* the original Wadsetter; for upon *Patrick's* renouncing the wadset Lands *ad remanentiam*, he *Dougal* executed an Obligation, wherein he became bound

bound to procure a Discharge of *Mary Campbell* his Mother's Life-rent. And the Respondent hereafter will have Occasion to show, that there is just Reason to believe, that such Discharge had accordingly been granted, and that *Mary Campbell* never had any Possession of the Lands of *Ardgadden*, after the Respondent's Grandfather became Purchaser of the Estate of *Otter*.

When this Cause came to be heard before your Lordships, it occurred to the Respondent's Council, that he was not only intitled to plead the positive Prescription upon the original Charters and Infeftments from the Earl of *Argyle*, and the subsequent Titles; but likewise upon the Rights and Titles of his Author, the Earl of *Argyle*, and his Authors; and, more particularly, upon the Charter and Infeftment, which were expedite upon *Jean Campbell's* and *William Stirling's* Apprising.

Defence
founded up-
on the Titles
of the Re-
spondent's
Family, as
well as their
own proper
Titles.

In this View it was maintained, that, independent of the Resignation in the Earl's Hand *ad remanentiam*, in 1674, the Respondent was intitled to connect the Earl's Possession, with the Infeftment of his Author, so as to make the Prescription begin to run from the Time of the Possession.

Sep. 17.
1663.

The Principle of Law was not much controverted; but it was objected, that the Title was void, in respect the Apprising being deduced by, and the Charter taken to, two different Persons.

Argument
upon Anne
Stirling's
Charter and
Seisin 1663.
as a Title
for Prescrip-
tion.

To this it was answered, *first*, That the deducing the Apprising, or taking the Charter in that Manner, were not repugnant to any Rule in Law.

It was objected in the *second* place, That the Earl had not a habile Title for Prescription in 1672, when the Respondent said his Possession had begun, because at that Time he had only Right to *Jean Campbell's* Part of the Apprisings.

But to this it was answered, *first*, That the Lands being adjudged to both the Creditors *in solidum*, a Right from either was a sufficient Title for Prescription, if the Possession followed in consequence of the Right from one. And, *2dly*, That *de facto* the Earl of *Argyle* had a personal Right from both the Creditors in 1672, which was afterwards

afterwards completed as to *William Stirling's* Part, by a Resignation *ad remanentiam* in 1674, as has already been taken Notice of; and which personal Right was sufficient in Law, for connecting the Possession to the last Infestment, in making out the Years of the positive Prescription.

Other Objections of less Importance were started; but it is unnecessary here to resume them, or the Answers made to them.

Dec. 3. & 4. 1663. The Earl's Infestment on the Estate of *Otter* as Superior, was pleaded upon as another Title in the Earl's Person, for establishing a Right by the positive Prescription; and it was maintained on behalf of the Respondent, that an Infestment of a Superior in Lands, which is an Infestment in the Lands themselves, as much as the Vassal's Infestment is, when supported by Possession, equally effectual for Prescription, as any other Infestment whatever; and that when Possession followed upon it for forty Years, the Property of the Lands were effectually vested in the Superior, and all subaltern Infestments defaced, because the Statute 1617 required only Possession for forty Years, upon a Charter and Seisin, which is a Title that every Superior has, who stood infest by virtue of a Charter under the Great Seal, as the Earl of *Argyle* did with regard to the Estate of *Otter*.

Argument upon the Earl of Argyle's Infestment *qua* Superior, as a Title for Prescription.

No satisfying Answer was ever attempted to this. It was indeed said, that when subaltern Infestments were granted, the Law required Resignations *ad remanentiam* to consolidate the Property with the Superiority. But this is no Objection to the Title at all for Prescription: For although it may be true, that a Resignation *ad remanentiam* may be necessary to operate an immediate Consolidation; yet it will not from thence follow, that the Superior cannot acquire an absolute Right to the Property, by his Possession in virtue of his Infestments, when the subaltern Rights are derelinquished for the Years of Prescription. And if the Law stood otherwise, it would run into this Absurdity, that every subaltern Infestment must remain a substantial and effectual Right *in perpetuum*, or until renounced; which is a Thing that no Lawyer ever attempted to maintain. And if the Earl's Infestment as Superior was a good Title for Prescription, it certainly could not be rendered the less effectual, by his afterwards acquiring, or taking a Right from the Apprisers.

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The Respondent could reap no Benefit from the Titles in the Earl's Person, unless Possession had followed in consequence of them; and therefore it was maintained, that although the Person who pleads the positive Prescription is in general bound to prove the Possession for the Years of Prescription; yet that in this, or any other Case, where the Challenge to the prescriptive Right is so long delayed, it was sufficient to prove Possession past all Memory, which must be presumed *retro* to the Commencement of the Right: And as the Respondent had not only proved Possession past Memory, but that Possession had even been admitted for a longer Time than the Remembrance of any Man could possibly reach to; it was but Justice to presume the Possession *retro* to *Jean Campbell's* Infestment in 1663, or at least to the Earl of *Argyle's* Right in 1672.

However, the Respondent did not rest upon the general Presumption, but did condescend upon the following Pieces of Evidence as sufficient *post tantum temporis*, for instructing, not only the Earl's Possession from the Commencement in 1672, but likewise the Possession of his Authors *Jean Campbell* and her Husband. Proofs of the ancient Possession.

1st, *Jean Campbell* and her Husband, immediately after acquiring Right to *William Stirling's* Share in the Apprising, did, in *July* 1667, institute an Action of Mails and Duties against the whole Tenants of the Estate; in which there was a second Citation given *pro confesso*, on the 2d of *December* in the same Year, agreeable to the Custom of these Times.

2^d, In *William Stirling's* Disposition, *Jean Campbell*, and her Husband, are assigned to the Annualrent of his Debt, from the Date of the Apprising; but in *Jean Campbell*, and her Husband's, their Conveyance to the Earl of *Argyle* in 1672, the Earl is only assigned to the Annualrents for the Year 1672; which affords the most pregnant Presumption, that *Jean Campbell* had got Possession, in consequence of the Action of Mails and Duties, and had thereby got Payment of the Annualrents due.

3^d, The Earl of *Argyle* did, immediately after his acquiring Right to the Estate by Disposition from *Jean Campbell*, and her Husband, grant a proper Wadset to *Dougal Campbell*, upon the 5th *June* 1672, of the Lands of *Ballilongart*, *Towlon*, half of *Corra*, half of the Ferry of

of *Otter*, and half of *Fernoch*, to be holden Feu of the Earl, for Payment of *L. 60 Scots* of Feu-duty.

4th, Excerpts taken from the Rental of the Family of *Argyle*, for the Years 1675 and 1676, which are the oldest Rentals extant; and from these Excerpts it appears, that the Feu-duty of *L. 60 Scots*, paid by *Dougal Campbell* the Wadsetter, is regularly stated; which shows, that the Wadsetter was then in Possession: And his Possession would without Doubt, have appeared in the same Way from the Commencement of his Right in the 1672, if the older Rentals had been extant.

5th, This is confirmed by the Feu-duty of *L. 60*, not appearing in the Rentals subsequent to the Year 1676, because the Respondent's Grandfather was assigned by his Disposition to the Rent for Crop 1677, and subsequent Crops.

6th, *Dougal Campbell* the Wadsetter, in 1678, renounced his Wadset to the Earl of *Argyle*; and the Renunciation, which is produced in Process, shows, that he only received the principal Sum of 8000 Merks, which clearly instructs he had got the Possession of the Lands, or otherwise he would have had a Claim for the Interest of the 8000 Merks.

Other material Pieces of Evidence were appealed to; but as Exceptions were taken to them, the Respondent shall not state them here, as he is advised, that the Evidence above set forth is fully satisfying, of the Earl of *Argyle* having at least had Possession of the Lands from the Commencement of his Right. How far that Possession is detracted from, as to Part of the Lands, by the two Liferents above mentioned, will fall hereafter to be considered. In the mean time, your Lordships will hold it in View, that the above Evidence, of the Earl's having entered upon the Possession, is more pregnant than could have been expected, from the Respondent, who, and his Predecessors, were unconnected with those Transactions; and that it is even more pregnant than Law or Justice can require, for supporting a Right by Prescription, which, by the Fault of the Petitioner, and his Predecessors, has come to be challenged so late, when there is no Possibility of having Parole-evidence, to reach to those Marks of Evidence of the ancient Possession.

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Copy of the Account referred to in the Order of the opposite page.

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Copy of the Account referred to in the Close of the opposite Page.

The date of the citation in the present action, is 28th March	1759	Possession.
Supposing the date of the present Otter's entry, to have been		
of the date of the registration of his feisin, 29th April	1678	Y. M. D.
		81 0 0

This makes 81 years, wanting 1 month and 2 days.

Deduce the following	Interruptions.	
	Y. M. D.	
1. The above-mentioned	0 1 2	
2. For change of stile in 1752	0 0 11	
3. Neil not being major till four years before he executed the revocation, 4th February 1690, that brings his majority to be on the 5th February 1686; so counting backwards betwixt that period and 29th April 1678, there intervened	7 9 7	
4. Alexander the writer not being born for seven months after his father Neil's death, deduce for his minority	21 7 0	
5. John the sailor, born 18 April 1714, so not major till 18th April 1735; and counting backwards from that period to Alexander the writer's death, on the 11th April 1732, there intervened	3 0 7	
6. The aforesaid period of the minority of Alexander the messenger, from 12th December 1744, when John the sailor died, to 20th July 1749, when Alexander was major	4 7 9	
7. Neil being forfeited on the 4th of January 1686, and not restored till the 4th of July 1690, deduce the period from the 5th of February 1686, when he is supposed to have been major, till the 4th of July 1690.	4 5 0	
		41 6 6
Remain,		39 5 24
This is upon supposition that Neil was full twenty-five years at executing the revocation; but as, from the pursuer's proof produced, and that which was unjustly refused to be produced, he was short of twenty-four, <i>inde</i> , falls to be deduced another year and the odd months and days		
		1 5 24
		38 0 0

Again, supposing the possession to go back according to the pointing of the pursuer's proof till the year 1675 *inclusive*, that will make no difference, as Neil's minority, backward to his father's death in October 1674, would take off their possession.

The Respondent shall now bring under the View of the Court the Evidence of the Minority of one of the Petitioner's Predecessors, with which he is pleased to suppose, that your Lordships were perfectly satisfied, but which the Respondent does not believe to be the Case, because he apprehends it to be such Evidence as no Judge in the World can rely upon, and that the Law will not permit Credit to be given to.

After the Petitioner had used every Means possible for proving Minorities, and other Matters, to defend him against the Effect of the positive Prescription, he did, in a Memorial upon his Proofs, exhibit the following Account, for shewing, that the Years of Prescription were not run, upon the Supposition of Possession being only to be counted from *Whitsunday* 1678, the Time of the Respondent's Grandfather's entering to the Possession of the Lands, and which is a Thing he never controverted, and stands proved by Parole-evidence, as clearly as any Possession so ancient can possibly be proved.

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For *Neil's* Minority, there is deduced in the above Account 7 Years, 9 Months, and 7 Days.

Neil's Minority and Endurance depends upon two Things, *first*, the Death of his Father *Patrick*: And, *secondly*, *Neil's* own Birth.

The only Evidence attempted for proving the Death of *Patrick*, is an Extract of his Testament-dative, dated the 15th *December* 1674. wherein it is said that he died "in the Month of *October* or thereby " 1674." And a Copy of a Testament-testamentar, quoted on the Back 1683.

To this Evidence it was objected, that the mentioning the Time of *Patrick's* Death in his Testament-dative, in the overly Manner done, is not legal Evidence; the Time of the Death not being essential to the Testament, and in which the Officer of Court might easily have been mistaken: And with regard to the Copy of the Testament-testamentar, it was observed, that as a Copy could prove nothing, and that the 1683, being marked on the Back, tended to discredit *Patrick's* dying so early as the 1674.

For Evidence of the Birth and Age of *Neil*, the Petitioner did first appeal to a Revocation executed by him upon the 4th *February* 1690, bearing, "Forasmuch as I, considering with myself that it is competent to me in the Law, within the Age of twenty-five Years, to " revoke, rescind, &c." And, *secondly*, A Summons of Reduction *ex capite minorennitatis*, reciting the Revocation which he had executed, in which a Summons was given out upon the 3d *November*, and returned the 11th of that Month.

To this it was objected, that a Person's own Assertion in a Deed of Revocation, was no Evidence of his being under 25 Years of Age: That the Revocation itself did not even bear him to be under twenty-five Years old: That possibly he, although more than twenty-five Years old, might have had in View in executing the Revocation, that the Time of his Forfeiture would be deduced; and this is the more probable, that he does not appear to have insisted in the Action.

Witnesses who had been acquainted with *Neil*, were examined on
both

both Sides as to his Age; and they differ widely in the Account they give us of his Appearance about the Time of his Death, so that their Evidence cannot be relied upon: But so far as it goes, the Witnesses examined by the Respondent, who make him of a greater Age than those examined by the Petitioner, seem, from their Manner of deposing, and their Cause of Knowledge, to merit the greatest Credit. They are to be found, State, p. 4. E. F. and p. 46. G.

Now, in place of your Lordships being satisfied of the Sufficiency of the Evidence of the Minority of *Neil* for seven Years, nine Months, and seven Days. The Respondent must believe, that your Lordships cannot hold him to have been at all Minor, after the Death of his Father, because there is no legal Evidence for instructing it; and it is no good Answer, that the Petitioner has brought the best Evidence that he could get, or could be expected at so great a Distance of Time; for as it is the Fault of the Petitioner and his Predecessors, that they have not brought their Challenge sooner, they cannot plead the Elapse of Time, as an Apology for the Defect of Evidence, however much a contrary Rule may take place with regard to the Respondent, who is not culpable in that Way, and who therefore is entitled to plead, that every Circumstance ought to be stretched to a Proof in his favour.

The Respondent shall only remark further with regard to the Minorities, that the Minority of *John* the Sailor, rests entirely upon a Certificate of his Birth, taken from the Records of Baptisms, which is not legal Evidence by the Law of *Scotland*, such Registers being under no certain Rules of Management, they being at most only a Memorandum or Note of what has been rehearsed to the Session-Clerk with regard to the Births in the Parish. He asserts nothing from his own Knowledge, and a false Date may be given to him, or ingrossed by him, either from Mistake or Design.

Minority of
John the sail-
lor.

The Petitioner has referred to several Commentators on the Civil Law, for ascertaining the Rules used in fixing the Ages of Persons, and has given us the Words of *Voet* on that Subject, where the *libri baptismatis* are mentioned as Evidence that ought to have great Weight.

In Countries where Registers of Baptisms are kept with Accuracy,
and

and made Part of the Police, they will, and ought to have in all Questions of this kind the greatest Credit. It is of such that *Voet*, and the other Authors referred to in the Petition, do speak. But we have no Registers of that kind kept with Accuracy in this Country, to which Faith can be given, unless when supported by other Evidence. The Record of the Baptism is indeed a material Circumstance in the Evidence of Age; but your Lordships never have given, and it will be dangerous ever to give full Credit to such Records, unless the keeping of them was put under better Regulations, than it is, or ever has been with us.

The Respondent having thus brought under the View of the Court, Part of the Pleas and Arguments offered on his Side, which, independent of his Objections to the Deductions claimed on account of the Forfeiture of *Neil*, he flatters himself will appear sufficient *ad victoriam causæ*, although they have been past over in the Petition in a great Measure by the Lump, the Respondent shall now proceed to make an Answer to the several Matters suggested in the Petition, and to which, though stated at great Length, and with much Anxiety, he imagines a very long Answer will not be necessary.

The Evidence of the Pursuer's propinquity observed upon.

The Petitioner sets out with plumeing himself highly, upon his being the Representative of the ancient Family of *Otter*: But he ought to have remembered, that the only Evidence of that Fact is, his being served Heir-male in general to *John Campbell* the Sailor at *Greenock*, who had been served Heir in general in 1737 to *Duncan Campbell* of *Evenechan*, and *Colin Campbell* of *Darinacherichbeg*, upon Parole Evidence only, not of Persons who *knew* the Propinquity, but who only *heard* of it; and indeed upon Evidence so lame, that it is much to be doubted, if it would be effectual against the Crown as *ultimas heres*. However, the Respondent has no Desire to deprive him of any imaginary Laurels he may have in view, from being the Representative of that Family, providing it is not to be used as a Reason for depriving him of his Estate, or any Part of it, after so long a Possession, unless there are found Principles and clear Evidence to go upon in doing so.

The Petitioner has likewise, for the Purpose of conciliating Favours, represented his Family-estate as now worth *L. 500 per annum*, which he says has been carried off from his Family for a Trifle; and he offers the

the Facility and Weakness, the Incapacity, and Want of Ability of some of his Predecessors, as an Apology for their not having attended sooner to vindicating their Right.

But the Petitioner has offered no Evidence of those Things: And the Respondent must be forgiven to say, that he knows one of them to be false, and believes the other not to be true. The Estate of *Otter*, when purchased, was not rentalled at *L. 100*; and it is now only about *L. 200*; which is no greater Increase of Rent than has happened in many Estates in the same Period of Time. The Predecessor, who had the best Opportunity of vindicating his Right to the Estate, if he had any, is *Alexander* the Writer; and on this Account he is represented as a weak Man; but the Respondent has heard a very different Character of him.

The Petitioner tells a Story of an Attempt made to preserve a Title to the Estate by means of an Adjudication upon a Debt of *Archibald Campbell* of *Otter's*; which Attempt, he says, was disappointed, by means of the special Charge being erroneous.

As to this, the Respondent will only observe, that the very Account given of this Matter is altogether contradictory to the Notion or Idea of its being a Plan in the Friends of the Family, to preserve a Title to the Estate; for if that had been the Case, the Adjudication would have been led with Attention, and they would not have omitted to charge the Heir to enter to the proper Predecessor. But truly the Debts being no more than 400 Merks, which is a Circumstance the Petitioner has chused to sink, affords real Evidence, that the Friends of the Family had nothing of that kind in view: And indeed if they had, it was an easy Matter for them to have brought the Validity of the Titles of the Respondent's Family to a Trial, by an Adjudication upon a Trust-bond.

The Petitioner has brought the Arguments in his Petition under three Heads. The *first* is, What he calls legal Favour, to which he says he has Right; the *second* respects the legal Consequences of *Neil* and *Alexander's* Forfeitures; and the *third* concerns the Effect *Anne Stirling* and *Mary Campbell's* Liferents have upon the Possession in computing the Years of Prescription.

Heads of
the Peti-
tion.

The Petitioner, under his *first* Head, has taken an Opportunity to
E give

Answer to
the legal Fa-
vour claimed
in the Peti-
tion.

give Prescription all the legal Abuse to be found in the Writers of the Civil Law, and points it out as a Monster that ought to be restrained.

The Respondent is not apprehensive of your Lordships being influenced by such Argument; but the Petitioner, and his Council, in Justice to the Law of their Country, ought at least to have made some Distinction between the negative and positive Prescription. Persons may be often hurt by the negative Prescription, which respects Obligations only, without their Fault, by Obligations or Grounds of Debt being lost, or falling aside and forgot; and therefore to take the Benefit of Prescription in such Cases has been termed odious: But the positive Prescription, as established in the Law of *Scotland*, merits a very different Appellation, and has always been considered as one of the Parts of our Law, that merits the most *liberal* Construction, as tending to *quiet* the Minds of the Subject against Challenges being made of their Rights to their Estates: And no Person can with Justice complain of that Law, which only provides a *Security* to him who possesses a real Estate upon a legal Title for forty Years together, *without Challenge* or Interruption, Forgetfulness, or other Causes, which may make the negative Prescription have sometimes the Appearance of Severity, will not apply to the positive Prescription of Land-rights, where the Estate possessed, and the Possession of it, is open to the View of every Mortal having the least Pretension of Right, and must put them in mind of vindicating it, if they think they have a sufficient Right.

And of all Cases that can occur, there is certainly the least Reason for considering this Case as unfavourable, or as defective of legal Favour (as the Petitioner terms it) on the Side of the Respondent. His Grandfather, eighty-nine Years ago, purchased the Estate in question at a very high Price, as Lands then sold. Lands, in that Period, have increased in their Value, and the Value of Money has decreased proportionally. The Estate of *Otter* is at present worth much more than the Respondent's Grandfather paid for it; but the Price paid for it, if then applied in the Purchase of other Lands, might have produced an Estate now full as good as that of *Otter*: And when such is the Case, and that it is confessed, that the Respondent, and his Predecessors, have, for so long a Course of Years, enjoyed the Estate, without any Challenge of their Right, or Claim being

being made to it by any Person, until this Action was commenced; he must be pardoned to think, that if legal Favour is known in the Law, or in Courts of Justice, it does lie altogether on his Side, and ought to operate in his Favour.

Neil Campbell, the Petitioner's Predecessor, and *Alexander Campbell*, the Respondent's Predecessor, and Owner of the Estate of *Otter*, were both forfeited for high Treason in *January 1685*, and were not restored against the Forfeiture till *July 1690*. And upon these Forfeitures the Petitioner grounds a double Plea, *first*, that the Currency of the Prescription against him was interrupted by the Forfeiture of *Neil*, to the Effect the Time of the Forfeiture be deducted from the Years of Prescription, because *Neil* was not then *valens agere* to stop the Prescription by any judicial Proceeding. And, *2dly*, That by the Forfeiture of *Alexander*, there was such a Breach in his Possession, as made it necessary, in computing the Prescription, to begin *de novo* from the Time the Forfeiture was removed.

The Pleas founded by the Petitioner upon the Forfeiture of *Neil*, one of his Ancestors, and of *Alexander*, Uncle to the Respondent.

The Respondent shall examine the Justice of these Pleas separately, and will begin with the Forfeiture of *Neil*.

The Petitioner has maintained his Plea, founded upon the Principle, *Contra non valentem agere, non currit prescriptio*, at great Length; and in support of it he has appealed to the *Roman Law*, to the Law of *England*, to the Opinion of some of the Lawyers of this Country, and to the Law of Reason itself: But he has taken very little Notice of the Statute 1617, which introduced the positive Prescription with us; or of the Argument which arises from that Statute, against the Doctrine pleaded by him.

Answer to the Plea grounded on the Forfeiture of *Neil*.

The long Prescriptions in the *Roman Law* did only respect Actions and Obligations; the *usucapio*, or what we call the positive Prescription, where any thing is to be acquired *per continuationem possessionis*, was for a small Number of Years. The Statutes of Limitations in *England* is within the same Predicament; and in all such Systems of Law, the general Rule, *Contra non valentem agere, non currit prescriptio*, may be an exceeding just one; and in that View the Principle appears to have been adopted anciently in the Law of this Country

Country, which was much founded upon the Principles of the Civil Law.

But the Statute 1617 has put the positive Prescription upon a different Footing, and has made it a Part of our *feudal System* of Law; and as the Enactment of that Statute is in general *positive*, with certain Exceptions, the Respondent is not acquainted with any *Rule of Interpretation*, that *permits* in such a Case, an Exception to be introduced that is not allowed of in the Statute.

In a Question between *Hamilton, Blair, and Robert Sheddan*, it came to be disputed so late as the 6th *December* 1754, whether the Years of Minority ought to be deduced from the Years of the positive Prescription; and the Doubt arose from the Exception of Minority made in the Statute being joined to the Clause regarding negative Prescription. The Question was debated at great Length before your Lordships; but it did not occur to any Lawyer to maintain, that Minority would be a Deduction from the Years of the positive Prescription, whether it had been mentioned in the Statute or not.

It is believed the Court were divided in Opinion: However, it carried, that the Exception of Minority made in the Statute, was applicable to the positive, as well as the negative Prescription: And although the Respondent cannot admit the Justice of the Decision; yet he does not mean at present to offer any Argument against it, as he does not think his Cause requires his endeavouring to overturn a Decision so lately given. However, he must be pardoned to enter a Caveat against his being barred from impugning the Justice of that Decision, and maintaining, that Minority is not a Deduction from the Years of the positive Prescription, if he shall find it necessary to argue that Point.

Holding then Minority to be a Deduction from the Years of the positive Prescription, the Petitioner argues thus. "Though the Statute 1617 does, in express Words, except only the Case of Minority, it can scarce be doubted, that the Exception would be extended by Construction, not by Force of the Statute, to similar Cases, where there is *par ratio*,"

If

If the Petitioner is right in this, our feudal Titles of Property are in a much more *uncertain* Situation than ever has been suspected or thought of hitherto; for by the Petitioner's Rule, *Madness* or *Fatuity*, or even *necessary* Absence from the Country, may all be the Occasion of Deductions from the Years of the positive Prescription: And as Madness or Fatuity particularly, may often be for a *long Endurance*, nay, for the greatest Part of the Lives of several Generations of a Family, no Number of Years could secure against the Challenge of feudal Titles; which is a thing so dissonant and adverse to the Principles of the very best Part of our Law, that the Respondent persuades himself, your Lordships will not be inclined to listen to it.

It will occur to every Person, on reading the Statute 1617, that the Legislature had it *in View*, to *prevent all Uncertainty* in the absolute Security of our Land-rights and therefore there is no Exception introduced on account of any Inability of uncertain Duration; for even Minority will not fall under this Description; and therefore it is that Madness, Forfeiture, or other Inabilities of that kind, which may be of long and uncertain Endurance, are not excepted in the Statute: And indeed it might be attended with very dreadful Consequences, if Prescription was not to run against a Person forfeited; for if so, no Person could say, he was certain of any Right with which a forfeited Person was in the least connected.

Again, Inability arising from Forfeiture does not properly fall under the Rule of *non valens agere*, for that Rule respects *only* the Cases where the Nature of the Right does not permit an Action *cum effectu* to be prosecuted, as in the Case of a Subject liferented, and in such other Cases, where, as is said in the Petition, "*the ratio decidendi*, is expressed to have been, *because the Law never put Parties to the Necessity of intenting Processes, where they can serve no Purpose but to stop Prescription.*" But an Inability from Forfeiture is not a Case of that Nature, as the Inability does not arise from the Nature of the Right of the forfeited Person, but from his own Crime; and it looks somewhat strange, that a Person forfeited for Rebellion should have his Rights preserved, which he would not have had, if he had not been forfeited.

Moreover, there is another evident Reason, why the Time of a
F Person's

Person's being forfeited, ought not to be deduced from the Years of positive Prescription; it is, that the Right of the forfeited Person could *cum effectu* be prosecuted by the Crown, or Donator of the Crown, during the Subsistence of the Forfeiture.

The Petitioner finding himself pinched with these Arguments, has had Recourse to a long Explanation of the Act Rescissory 1690, from the History and political Papers of *that Æra*, which he says are the best Interpreters of political Laws: And he endeavours to make out, that it was the Intendment of the Legislature to restore the Persons named in the Statute *ex justitia*; and from thence draws this Conclusion, that the Legislature could not possibly mean, that any of the Persons restored, should be hurt by their Incapacity to sue while they were under the Forfeiture.

It does not seem to vary the Argument much, whether the Restitution by the Statute was understood to be *ex gratia*, or *ex justitia*; for in either Case, as the Crown stood in the Right during the Forfeiture, there was no Inability to prosecute from the Nature of the Right.

But further, without entering into a Discussion of the political Papers, or of the Opinions of Historians, the Respondent will take upon him to aver, that in sound Construction, the Statute does import a Restitution *ex gratia*, and not *ex justitia*, for this plain Reason, that it does not declare the Decrees of Forfeiture to have been void from the Beginning, but only that they shall "be void, and " of no Avail, Force, Strength, nor Effect, in all time coming."

If your Lordships shall require further Satisfaction in this Matter, you have only to throw your Eye upon the 41 Act of the same Parliament, rescinding the Forfeiture of *John Swinton* of that ilk *ex justitia*, where very different Words are used, the Decrees of Forfeiture, and Gift of Forfeiture, being declared "to have been from " the Beginning, to be now, and in all time coming, void, null, " and of no Avail, Force, Strength, or Effect;" and *Swinton* is restored against the Forfeiture, "and all that has followed, or may " follow thereupon, *by way of Justice*."

The Act Rescissory must be your Lordships Rule in judging of this Case:

Case: And if it is clear from it, that the Persons forfeited, and *Neil Campbell* amongst others, is only restored *ex gratia*, then it is clear that the Petitioner in his Right cannot plead his own Crime or Forfeiture in bar of the Years of Prescription running against him; more especially as the Crown was vested in his full Right during the Forfeiture, and might have prosecuted an Action for recovering the Lands.

The Respondent shall only observe further upon this Point, that if it had been the Intendment of the Legislature to prevent the Forfeiture of the Persons named in the Statute, from being hurtful to them in Matters of Prescription, it would have been declared so in express Words: And it is clear from the Act 40 of the same Parliament, that the Legislature did not intend the Rebellion or Confusion of those Times, to be the Ground for any Deduction from the Years of a long Prescription, because the Deduction is expressly limited to short Prescriptions only. And the same thing was done after the last Rebellion, by Act 7. anno 13. Geo. II. § 2. The Words are, "That the Time and Space between the said 16th Day of September 1745, and the said 1st Day of June 1746, shall not be reckoned in any short Prescription, but shall be deduced from the same." Plainly indicating, that there was to be no Deduction from the Years of the long Prescription.

As to the Decision in the Case of the Earl of *Lauderdale*, the Respondent shall only beg Leave to say, that it is a single Decision, and ought not to be regarded, because of its being contrary to the clear and sound Principles of Law, and that the Decision appears evidently to have been against the Opinion of Lord *Stair*, for in his Institutes he speaks of it with Surprise. "Yea," (says he) "Prescription was found not to run against a Party forfeited," &c.

It is scarcely necessary to remind your Lordships upon this Head, that *Neil* appears *de facto* to have been *valens agere* prior to the Act Rescissory 1690; for in *February* of that Year, he executed a Summons of Reduction *ex capite minorennitatis*.

Alexander Campbell, the Respondent's Uncle, was forfeited, as has already been observed, and his Estate of *Otter* was gifted to one *Maclean*, who possessed it till *Alexander* was restored. And the next

Question

Answer to the Plea grounded upon Forfeiture of *Alexander*, the Respondent's Uncle.

Question for the Consideration of the Court is, Whether *Alexander's* Forfeiture did make an Interruption in the Possession, so as to make it necessary to commence the Computation of the Years of Prescription of new, from the Time of his being restored?

The Petitioner has likewise argued this Point at great Length, and endeavoured to support it by many Authorities; but the Respondent imagines your Lordships will soon be satisfied, that he has either misapplied or misrepresented the Law in every Part of his Argument. And,

1^{mo}, Although the Authorities appealed to from the Civil Law, and Lord *Bankton's* Opinion, who copies after them, were to be held to be the Law of *Scotland*, which the Respondent cannot admit to be the Case, particularly with regard to the positive Prescription, which is introduced by the positive Enactment of a Statute by which it must be regulated; yet it is plain, that those Authorities are not applicable to this Case, because they only concern a *voluntary* Discontinuation of Possession, or a *forcible* Dispossession by another *without a legal Title*, which will not apply to the Forfeiture of *Alexander Campbell*, unless it can be maintained, that the forfeiting and seizing a Rebel's Estate, who commits Treason, is an *illegal* Dispossession of them.

2^{do}, The Petitioner misrepresents the Law exceedingly, when he maintains, that when the King takes by Forfeiture, he does not take in the Right of the forfeited Person, but *jure coronæ*, and in virtue of his paramount Right as Superior.

It is not easy to discover from the Argument in the Petition, in what Way, or by what Means, the Estate of forfeiting Persons should vest in the Crown, in the Manner pointed at in the Petition; and it would seem to be the Consequence of the Doctrine maintained in the Petition, that all Land Estates, upon the Forfeiture of the Vassal, should revert to the immediate Superior, and which, the Petitioner says, was anciently the Law. And as the Distinction endeavoured to be established in the Petition, is far from being obvious, and is very repugnant to the common Ideas and Conceptions of Mankind, and even to the Opinion of Lawyers, who have held it to be a Maxim, that *foris facere est alienare*, it was to be expected,

pected, that the Petitioner, before advancing so new a Doctrine, would have been able to have supported it by some Authorities, but the Respondent can discover none in the Petition.

Such then being the Case, it is thought your Lordships will not be inclined to go into this new Distinction, but to hold the Law as it has been long understood, *viz.* that when the King takes by Forfeiture, he takes by the *Act* and *Deed* of the forfeiting Person, and therefore he is entitled to every Privilege and Right that was competent to the Person forfeited: And if such was not the Case, the King would be deprived of the Benefit of the forfeiting Person's Possession, for establishing a Right by Prescription; and many other Privileges that may be figured to arise from the Crown's Possession being held to be a *Continuance* of the Vassal's Possession, or a Possession *in his Right*, which is the same thing.

If the Respondent is in the Right in these Things, then an easy Answer occurs, to the Argument of the Crown's having neither Title nor Right to prescribe or interrupt against itself; which is, that *de facto* the Crown did not possess, but *Maclean* the Donator of the Crown, who, in the Right of the forfeiting Person, did continue his Possession, and might have been prosecuted by the King in the Right of *Neil*, if his Majesty had been so disposed.

But, moreover, if the Act Rescissory was to be supposed to have had the Effect contended for by the Petitioner, to wit, the replacing every thing in *statu quo*, it will not be easy to discover a good Reason, why *Alexander* should suffer any thing by being turned out of the Possession. This has been started in the Petition, and has not received a satisfying Answer. And,

Upon the whole of this Matter, as *Alexander* was forfeited, and his Estate possessed during the Forfeiture by a Donator, there can be nothing more agreeable to the Principles of Law, Reason, and Justice, than that when he was restored, the Possession should have been understood to have been continued in the same Way, as if he had alienated his Estate by a voluntary Disposition.

The Respondent comes now, in the Order of the Petition, to make Answer to the Petitioner's Argument, founded upon the Life-rents of *Mary Campbell* and *Anne Stirling*.

Answer
to the Pe-
titioner's
Argument
upon the
Liferent-
rights.

The Justice of the Rule, *Tantum prescriptum quantum possessum*, is admitted; but the Respondent cannot agree, that in no Case the Possession of the Liferenter can be beneficial to the Proprietor, in making out the Years of Prescription, where the Liferent has been constituted by the Proprietor's Author in the Lands. If the Liferent was universal, or of the greatest Part, the Rule might be just; but when the Liferent is inconsiderable, and the Proprietor has the universal Possession of the rest of the Estate, under a Right to the whole, it seems that it is at least doubtful in such a Case, whether the Possession of the Liferenter might not justly in Law be counted the Possession of the Proprietor, in the same Manner as if the Liferent had been derived from him. However, your Lordships will have no Occasion to determine any nice Question of that kind in this Case, there being other clear and solid Grounds for refusing Effect to the Liferents in this Cause.

Mary
Camp-
bell's
Liferent.

The Respondent agrees, that *Mary Campbell's* Liferent of the Lands of *Ardgadden* was not constituted by a Wadset from the Duke of *Argyle*; he does not recollect its having been so pleaded; at least it is not stated so in his last Memorial; and the Parties now agree in the Fact, that it was *Colin Campbell* of *Otter*, the Petitioner's Predecessor, if he is the Heir of the old Family of *Otter*, who granted the Wadset to *Duncan Campbell*, of which *Mary Campbell* his Spouse got the Liferent.

Now, if the Respondent found himself straitened with this Liferent, he might maintain, that *Jean Campbell*, the Earl of *Argyle's* Author, having, by her Apprisement, carried the Right of Reversion, the Wadsetter's Possession became her Possession, and consequently beneficial to her, the Earl and the Respondent, in making out the Years of Prescription. But the Respondent has no Use for such an Argument. For,

As *Dougal Campbell*, the Son of the original Wadsetter, did make up a Title to the Wadset, by an Adjudication in the Name of *Patrick Campbell* his Trustee, who, after completing a feudal Title to the Wadset, conveyed it to the Earl of *Argyle* the Superior, and in whose Person it was extinguished by a Resignation *ad remanentiam*, it became impossible for the Liferent longer to subsist; and therefore the Obligation taken from *Dougal* to procure a Renunciation from his

Mar. 9.
1678.

his Mother was altogether superfluous, because when the Wadset itself was extinguished, the Liferent could not possibly subsist. And the Respondent holds it to be clear in Law, that the Reversor, which the Earl of *Argyle* came to be in this Case, may redeem a Wadset, or extinguish it by Resignation *ad remanentiam*, when he acquires it by Disposition, without regard to any Liferent that may have been constituted by the Wadsetter; and in such a Case, the Liferenter must betake herself to the Interest of the Money.

But further, there is the most satisfying Evidence that possibly can be, that *Mary Campbell's* Liferent was understood by all the Parties concerned to be extinguished; for, upon the 12th of *November* 1678, the Respondent's Grandfather granted a Liferent of these very Lands of *Ardgadden*, and others, to *Anne Campbell* his Spouse, in virtue of which she was infeft; and it is admitted in the Petition, that at taking up the Valuation of the Shire of *Argyle* in 1687, *Anne Campbell*, then a Widow, gave up the Rental of the Lands of *Ardgadden*, and others, liferented by her, for the Year 1680, and downwards.

The Petitioner in opposition to this, says, that the Rule followed by the Commissioners, in making out the Valuation of the County, was to take an Account of what the Lands paid *anno* 1680, and subsequent Years; and as *Anne Campbell* might know, that the Lands had not been heightened in the Rents, it was an easy Matter for her to say what the Rents was in 1680, without her having possessed them from that Time: And he further says, that supposing this to be held for Evidence of *Anne Campbell's* being a Widow, and *Mary Campbell's* being dead in 1678; yet that will not prove *Mary Campbell's* Want of Possession for the preceding Years; and as Life is to be presumed, she must be understood at least to live down to the 1687, unless the Respondent can prove the contrary.

The Respondent cannot agree, that the Proof of *Mary Campbell's* Death, or her not being in Possession, is incumbent upon him. He holds the Estate, and maintains his Right to it, under catholic Titles to the whole Estate. He has proved his own, and the Possession of his Ancestors of the whole Estate, as far back as the Memory of Man can go. All the Witnesses agree, that they never knew or heard of any other Person's possessing the Estate, or any

Part.

Part of it, other than the Respondent's Family. If there is any Doubt as to the ancient Possession, it is owing to the Petitioner's Fault, who ought to reap no Benefit from it. And therefore when all those Things are taken to Consideration, the equitable and proper Rule of the Law for deciding in this Case will appear to be, that Possession is to be *presumed* for the Respondent, *unless* the Petitioner can prove the contrary; and that every Circumstance from whence a Presumption of Death, or Want of Possession may be inferred, is to be constructed into Proof against the Respondent, if he does not remove the Force of the Presumption by contrary Evidence; but it is from his *Fault* that the Uncertainty has arisen.

Although the Respondent takes the Liberty of putting your Lordships in Remembrance of these general, just, and equitable Principles, for ruling the Judgment in every Case of this kind; yet there is little Occasion for using them in the present Case; for the Respondent can even give satisfying Evidence of *Anne Campbell's* being a Widow in the 1680, and of Consequence that she gave up the Rental of her Lands for that Year, in virtue of her own Right of Liferent. The Evidence the Pursuer means, is a Licence taken out from the Commissary-court of *Argyle* by her Son *Alexander*, to pursue her Husband's Debtors, to make Way for a Confirmation, and which Licence to pursue is dated the 12th May 1681; and it is probable that her Husband was dead some time prior to that. And indeed, independent of that Evidence, it would be absurd to suppose, that *Anne Campbell* would have been called upon, or that she would have given in upon Oath a Rental of her Liferent-lands, for the Year 1680, if she had not had Right to, and uplifted the Rent of that Year.

Anne Stirling's Liferent. The Fact as to *Anne Stirling's* Liferent has already been stated; and your Lordships will have observed, that the Petitioner has committed two Mistakes with regard to it: *First*, In setting forth, that she was infeft in the Lands for her Liferent; and, *secondly*, In supposing, that the Feu-duty payable out of her second Husband's Estate, Mr *Macneil* of *Taynish*, and conveyed to the Respondent's Grandfather to answer the Payment of *Anne Stirling's* Liferent, was not sufficient for that Purpose.

Anne Stirling was married to *Taynish*, when the Respondent's Grandfather

Grandfather purchased the Land from the Earl of *Argyle*; and as a full and adequate Price was paid for the Lands, it was necessary that the Purchaser should be relieved of any Claim *Anne Stirling* might have to the Liferent of any Part of the Lands, and in Possession of which, it is probable, she was at that Time, although we have no Evidence of the Fact. This could not be done in a more expedient Manner, than by the Earl's conveying an equivalent Sum to the Respondent's Grandfather, of the Feu-duties payable out of the Lady's Husband's Estate; by which Means the Matter could be easily adjusted, so as the Respondent's Grandfather might have full Possession of the Lands, and *Taynish* and his Wife might be allowed to retain their Feu-duties.

By what Form of Writing or Agreement the Matter was adjusted between Mr and Mrs *Macneil*, and the Respondent's Grandfather, is unknown. As the Lady was not infest, no formal Discharge or Renunciation was necessary: The Matter could be settled by a Letter, or even a verbal Agreement was sufficient. And the only Question is, Whether *de facto Anne Stirling* did get Right to, and possess the 600 Merks of Feu-duties, in place of any Liferent-right she had out of the Estate of her former Husband? And of this Fact we have more satisfying Evidence than could well have been expected at this Distance of Time.

In the *first* place, It appears, that in the making up the Valuation of the Shire of *Argyle*, two Rentals were given in of different Parts ^{1687.} of the Estate of *Otter*; the one by *Anne Campbell*, the Respondent's Grandmother, of those Parts of the Estate liferented by her; the other by *Alexander Maclean*, the Donator of the Forfeiture of *Alexander Campbell*, the Respondent's Uncle, the then Proprietor of the Estate of *Otter*; and which two Rentals do exactly comprehend the whole Farms of the Forty-merk Land of *Otter*, and show to a Conviction, that *Anne Stirling* was not then in Possession of any Part of the Estate, or otherwise she would undoubtedly have given in the Rental of the Lands liferented by her, in the Manner *Anne Campbell* did.

In the *next* place, *Anne Stirling's* Acceptance and Possession of the 600 Merks of the Feu-duties, is equally clear, from the Proceedings before the Lords of the Treasury, taken Notice of in the Petition

The Petitioner has treated those Proceedings as dark and mysterious; and says, he is not able to account for them. But the Question is, who is to *suffer* by that? Is it he who has neglected so long to bring his Action, as the Facts cannot be explained by living Witnesses, or the Respondent, who is not to blame? In this there can be no doubt.

However, the Respondent hopes he will be able to make these Proceedings very intelligible, and very satisfying to your Lordships.

Donald Macneil of Gallachy was married to a Daughter of *John Macneil of Taynish*, as the Respondent has been informed; and the Estate of *Taynish* was disposed to him as a Trustee for the Family, and a Person more able to manage and take care of the Estate than the real Proprietor was.

The Respondent has the more Reason to believe his Information to be true, that he has discovered in the Chartulary of the Family of *Argyle*, a Charter of the Estate of *Taynish*, granted to *Neil Macneil*, the Nephew and Heir of *John Macneil of Taynish*, and his Heirs-male; whom failing to *Donald Macneil of Gallachy*, and his Heirs-male; and which Charter proceeds upon a Procuratory of Resignation, executed in the 1696, by *Donald Macneil of Gallachy*, with the Consent of *John Macneil of Taynish*.

Upon the Forfeiture of the Earl of *Argyle*, his Estate was seized by the Crown, and put under the Administration of this Court for the Payment of his Creditors.

It seems that *Donald Macneil of Gallachy* was a Creditor to the Earl of *Argyle*, and had got an Assignment to the Feu-duties of *Taynish* for his Payment, with the Burden of the Lady's Liferent of 600 Merks: And as the Lady was desirous to have some Order for making her Payment effectual, applied to the Lords of the Treasury for that Purpose by Petition; and the Deliverance upon the Petition speaks out the whole Matter. It is in these Words: " Finds, that
 " the Lords of Session, by virtue of the Commission granted to
 p. 32. " them under the Great Seal, for disposing upon the Estate of the
 " late Earl of *Argyle* to his Creditors, disposed to the said *Donald Mac-*
 " *neil*,

“*neil*, as one of the Earl's Creditors, the Feu-duties payable by
 “ him out of his own Lands of *Taynish* to the said Earl, expressly
 “ with the Burden of the said Lady *Taynish* her Liferent of the 600
 “ Merks, as the Decreet of the Locality, of the Date the Day of
 “ 1680 Years, more fully bears: And the Lords having also
 “ heard the said *Donald Macneil* upon the Matter, and he acknow-
 “ ledging the same to be true; and that the only Reason given by
 “ him for not Payment to the said Lady *Taynish*, was because she was
 “ not infest therein: Therefore the saids Lords Commissioners of his
 “ Majesty's Treasury, do hereby ordain the said *Donald Macneil* to
 “ pay to the above *Anne Stirling*, Lady *Taynish*, the 600 Merks a-
 “ bove specified, for the Years bygone resting owing and unpaid to
 “ her, and yearly in time coming during her Lifetime, as said is.”

The Petitioner asks why the Respondent did not excerpt from the Books of the Treasury, and lay before your Lordships the Copy of the King's Letter to the Lords of the Treasury, respecting this Matter, and recited in the Petition?

The Answer the Respondent gives to this Question is, that he considered the Deliverance upon the Petition itself to be fully satisfying; and that he did not chuse to load your Lordships with reading unnecessary Proofs. But since the Petitioner has produced a Copy of the Letter, and endeavoured to shew a Contrariety between it, and the Deliverance upon the Petition, and to treat the whole Matter as a Mystery, the Respondent will be forgiven to observe, that the King's Letter is corroborative Evidence of the Fact the Respondent was to establish, to wit, *Anne Stirling's* Acceptance of the 600 Merks; and that the Discrepancies marked in the Petition, and the Minute of the Lords of the Treasury, are mere Criticisms, of no Significancy.

The Petitioner seems to be much at a Loss what to make of the King's Letter. In one Paragraph he argues upon it, for discrediting the Proceedings before the Lords of the Treasury: In another he denies the Existence of such a Letter, because the Original is not produced. In short, he behaves like a sinking Man, plunging about for some Twig to gripe at, which he cannot find.

Amongst the other Exceptions taken to the Proceedings before the

Lords of the Treasury, it is said, that if the Petition had been genuine, *John Macneil of Taynish*, the Lady's Husband, who was then alive, would have concurred with her in it.

If *John Macneil of Taynish* had been an active and diligent Man, and had taken this Matter under his own Direction; or if the Affair had been laid before Counsel, to know whether it was proper to have her Husband concur with her or not; it is very probable, that the Petition might have been made in the Name of the Lady, with Consent of her Husband. But as *John Macneil* had been in Effect deprived of the Administration of his own Affairs; and that the Petition was probably made out by one not much acquainted with judicial Proceedings; it is not at all surprising, that the Husband should not be a Party to the Petition. And indeed it may have been thought, by the Person who wrote the Petition, and not without Reason, that it possibly would be fully as much listened to, when in the Name of a Lady alone, as when explained, that she was under the Coverture of a Husband; for the Lords of the Treasury were not tied down by the rigid Rules of Law, in determining upon such Questions.

Besides, if it can give any additional Satisfaction to your Lordships in this Cause, the Respondent can forthwith instruct, that *John Macneil of Taynish*, the Lady's Husband, was altogether unfit for taking the Direction of any Matter of this kind, as he could not so much as write his own Name. The Respondent is possessed of a Paper, dated about that Period, subscribed for him by Notaries.

The Petitioner seems to lay some Stress upon what he calls a Petition from *Alexander Campbell*, the Respondent's Uncle, to the Commissioners for Lines and Forfeitures, wherein Complaint is made of many violent Intromissions with his Effects and Estate, during his Absence from the Country; and more particularly, that *John Macneil of Taynish* had levied L. 400 Scots yearly for four Years from 1685 inclusive, as the Feu-duty due by him, to which the Petitioner *Campbell* had Right; and likewise upon what is called an Account, divided into different Classes; in one of which there is stated L. 104 Scots, as uplifted by *Taynish* from the Tenants of his Wife's Life-rent-lands.

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The Period to which these Transactions refer, was full of Disorder and Confusion; and it is not easy to give a satisfying Account of the Motives or Intentions of many Writings relating to these Times; but the Respondent thinks he can satisfy your Lordships, that those Writings appealed to do not support his Plea in any Respect; and at any Rate, that they are altogether insufficient for redarguing the pregnant Evidences above taken Notice of, for ascertaining, that *Anne Stirling* did not possess any Part of the Estate of *Otter*, after it was purchased by the Respondent's Grandfather. And,

1mo, Neither the Paper called the Petition, nor the Accounts, are subscribed or authenticated any Manner of Way, and therefore are not legal Evidence. But,

2do, Supposing such Petition to have been given in by *Alexander Campbell*, to the Commissioners for Fines and Forfeitures, it proves no more than that *Alexander Campbell*, when complaining of the Acts of Injustice he had met with, was pleased to state *Taynish's* retaining his Feu-duties as one, and which probably he might have been led to do, from his not having got any of the Rents of his own Estate for the Years mentioned in the Petition. And however that may be, as there is no Evidence or Reason to believe, that ever *Alexander Campbell* recovered any of the Feu-duty, in consequence of that Petition; so *Taynish's* having refused to pay them, affords a strong Presumption, that they were allowed to remain with him, in Consideration of his Wife's Liferent.

3tio, The Argument arising from the Account is sufficiently answered by the following Words, in the Copy of *Alexander Campbell's* Petition, immediately following those recited in the Pursuer's Petition, "As also the Sum of L. 200 Scots, arbitrarily exacted by the said *John Macniet* from your Petitioner's Tenants, in Name of escheat Goods."

If more Evidence was wanted to satisfy your Lordships, that *Anne Stirling's* Liferent-lands were possessed by the Respondent's Predecessors, and particularly that *Alexander Campbell* was in Possession of them, the Respondent might resort, (if Copies are to be allowed as Evidences) to a Copy of a Writing taken Notice of in his last Memorial to the Court, which appears *ex comparatione literarum* to be of the

the Hand-writing of *Alexander Campbell*, wherein he takes particular Notice of the Cattle and other Stocking belonging to him, which had been spuilzied and away taken from the Lands of *Largiemore*; and which Lands being Part of the liferented Lands, clearly shows, so far as a Copy of Writing can be relied upon, that he was in Possession of them.

The Respondent has not, nor will not recite any of the Parol-evidence that has been adduced in this Cause, as these Answers have run into a greater Length than he could have wished: But he must beg Leave to remind your Lordships, that the Parol-evidence, as it stands collected in the printed State of Proofs, is not only very satisfying as to *Mary Campbell* or *Anne Stirling's* never having had any Possession of their Liferent-lands, after the Sale to the Respondent's Grandfather; but even as to the Earl of *Argyle's* Possession of the Estate prior to that Period. Almost all the old Witnesses, aged 80, and upwards, concur in saying, that they never knew nor heard of the Estate of *Otter*, or any Part of it, being possessed by any other Persons than the Respondent's Family, and Commissary *Maclean*, during the Time of *Alexander's* Forfeiture, as the Donee of the Crown; and many of them say, that they heard the Estate was possessed by the Earl of *Argyle* when he sold it to the Respondent's Grandfather.

Upon the whole, the Respondent flatters himself, with some Degree of Confidence, that the Court will be of Opinion, that the Proofs have come out to be as satisfying upon his Side, with regard to the ancient Possession of the Estate, as well could be expected; and he doubts not, that if any Part of it should appear to be dark or obscure, your Lordships will apply the well-known Rule, in determining on Evidence in such Cases, that he from whose Fault the Obscurity does arise, should suffer by it, and not he who had it not in his Power to prevent it.

In respect whereof, &c.

J. A. MONTGOMERY.

